infrastructure and new features are available for use free of charge, there is no incentive to build the infrastructure, or to innovate new features and technologies for that infrastructure.

For the same reasons, with Bill and Keep there is absolutely no incentive for CMRS providers to use competitive LECs ("CLCs") or CAPs. CMRS providers would not pay for something that they get from the LECs for free.

This effect is known as "free riding."[133] With Bill and Keep, there is no economic incentive for a CMRS provider to build out parts of its network, or use non-LEC networks, where it can free ride off LEC investment. Free riding inevitably leads to less investment, and consumers have fewer choices of new products and services.

Tandem Networks -- Recommendations To Expand Bill and Keep Remove Its Facade

Rather than confine the uneconomic Bill and Keep proposal, CTIA and other CMRS providers say it should be greatly expanded to include the LECs' tandem interconnection and any other point of interconnection.[134] CTIA explains how use of the LECs' tandem networks can reduce the costs of CMRS providers.[135] Use of LEC tandem networks can reduce CMRS providers' costs precisely because we have invested in these networks and incur costs operating them. In fact, most CMRS providers have chosen our Type 2A Tandem Access interconnection because it saves

[133] See Comments By Pacific Bell, Pacific Bell Mobile Services, and Nevada Bell, Exhibit B, Statement By Jerry Hausman, paras. 18-19.
[134] CTIA, pp. 9, 43; AirTouch, p. 20; APC, p. 2; Comcast, p. 23.
[135] CTIA, p. 43.

them the cost of building their own facilities to our end offices. Providing this benefit creates the substantial costs of the CMRS providers' use of our tandem switching networks for network aggregation. We do not recover these costs via any other network charges, e.g., they are not recovered via charges for dedicated entrance facilities. The costs of tandem switching and common transport are usage sensitive, and we must continue to recover them from usage-based prices in order to have an opportunity to recover our costs.

The CMRS providers are attempting to get for free what IXCs pay for via access charges. Accordingly, CompTel states: "[C]ommon or tandem switched transport costs should be recovered from CMRS providers just as they are from interexchange carriers, i.e., through the existing access tariffs. No other result is consistent with the principle of nondiscrimination and cost-based pricing where the use of the ILEC network is the same."[136] Some CMRS providers have purchased interconnection via our access tariffs as recommended by CompTel. Most have negotiated arrangements tailored to their specific desires. These options should continue. They should not be replaced by giving away the service to CMRS providers via Bill and Keep.

Giving away tandem-switched transport would be directly contrary to the Commission's policies. As the Commission has explained:

> If the transport rate structure is to be cost-causative and thereby encourage efficiency, tandem-switched transport users should be required to pay for the tandem features and functions they use. Otherwise, the rate structure would encourage more tandem use than would be economically efficient and would, because of regulatory pricing policy,

[136] CompTel, p. 21.

> preclude effective competition in the provision of tandem switched transport.[137]

Concerning Bill and Keep, CTIA points out, "if total termination costs are approximately equal, neither carrier bears a disproportionate burden."[138] The only way that the Commission's NPRM, Dr. Brock, and CMRS providers have attempted to justify Bill and Keep is by trying to show that the costs of interconnection are near zero. The attempts have failed. AirTouch argues that the costs are near zero during peak periods and relies on Dr. Brock,[139] but Dr. Brock never said that.[140] Time Warner admits that Dr. Brock's cost test for Bill and Keep is not met, but recommends Bill and Keep anyway.[141] PCIA admits that Bill and Keep is not cost-based, but also recommends it.[142] In their joint comments, Sprint and APC state that "studies based on the Bell operating companies' own data suggest that a bill-and-keep system is an effective proxy for the actual costs of terminating traffic...."[143] But the study to which Sprint and APC refer is the RAND study used by Dr. Gerald Brock.[144] As Professor Hausman has explained that study's purpose was "to develop a cost methodology and 'initial

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[137] Transport Rate Structure and Pricing, CC Docket No. 91-213, Report and Order, 7 FCC Rcd 7006, 7018 (1992).
[138] CTIA, p. 21.
[139] AirTouch, p. 19.
[140] See NPRM para. 61, n. 78, & para. 67.
[141] Time Warner, pp. 19-21.
[142] PCIA, p. 7.
[143] APC and Sprint, p. 7.
[144] See Id. at 7 and 21. Comcast (pp. 6 & 10) also relies on that study.

estimates.' " It "expressly left out cost elements of the network....and was explicitly not used at the California PUC."[145]

The CMRS providers' attempt to extend Bill and Keep to the LECs' tandem networks and any other network point removes any facade that Bill and Keep is cost based. With this expansion, it is clear that the interconnection in question has substantial costs, reflected by the access charges that IXCs are paying. The high cost combined with the LECs' termination of over four times more traffic for CMRS providers than is terminated by CMRS providers for LECs' makes it clear that Bill and Keep would be one-sided and extremely costly to the LECs.

The CMRS providers try to avoid this problem. On the one hand, they argue that their networks are like the LECs' and have tandem-type structures and costs.[146] That does not resolve the issue because the overall traffic imbalance of over four to one means that even if CMRS providers had the same structure their relevant costs would be approximately one-fourth of the LECs' costs.

The CMRS providers reverse field and argue that their networks are not like the LECs, and that it costs them more to terminate LEC traffic than vice versa.[147] This argument too is defective on its face because none of the CMRS providers allege that their costs are anywhere near four times higher than the LECs' costs, as would be required to offset the traffic imbalance.[148] Moreover, because of wireless calling

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[145] See Comments By Pacific Bell, Pacific Bell Mobile Services, and Nevada Bell, pp. 55-56, and Exhibit B, para. 34.

[146] E.g., APC, p. 2; AT&T, p. 9.

[147] See E.g., AT&T, p. 12.

[148] The CMRS providers have not offered to share their cost data, even though we have shared our data with them. America's Carriers Telecommunication

characteristics,[149] the LECs' costs for termination of CMRS providers' traffic are higher than for access, and it is unlikely that CMRS providers' costs are higher than LECs' costs.

Undaunted in their quest for free termination, CMRS providers argue that other customers are already paying enough to cover the costs of the LECs' networks, and thus CMRS providers should be given a free ride.[150] Besides being a request for unlawful discrimination, this argument ignores the way LECs price. Under price caps, forms of which we have at both the federal and state levels, we have some pricing flexibility. Revenues from CMRS providers can help provide us the opportunity to lower prices. Excluding a group of customers from payment would help frustrate that opportunity.

Requesting a free ride because others are paying the costs is like a stranger coming to town and requesting a free ride on the subway because it is going to run anyway and regular customers are covering the costs. Even if the Commission agreed with this concept, it would not cover the situation where another subway car had to be added in order to carry the stranger and all the other "strangers" that come to town for a free ride.

Still undaunted, the CMRS providers attempt to deal with that situation with another argument. CTIA challenges the perception that the LECs' "networks cannot accommodate the traffic generated by today's mobile telephone services without adding

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Association (p.2) states that the LECs' networks "would clearly have the highest cost structure."

[149] See Part II - A-1 above.

[150] AirTouch, pp. 20, 29-30.

network capacity."[151] CTIA says that because LECs engineer their networks to "an extraordinary high standard...there is almost no call blockage within the nationwide telephone system, even at peak calling periods."[152] Of course, what this shows is that LECs try very hard to anticipate demand in order to try to ensure against call blockage. Our customers expect and deserve this level of service all the time. Penalizing LECs for doing a good job by providing a group of customers with free use, makes no sense and would risk degrading service below the high standards that our nation's telecommunications users expect.

Moreover, the strain on LEC networks has increased tremendously because of the growth of the Internet and on-line services. Another group of service providers, ESPs, obtained a "temporary" benefit in 1983, the ESP exemption, which still exists and illustrates what can happen with preferential pricing concepts like Bill and Keep.

ESPs do not pay the access charges that other carriers interconnecting with local networks do. Even major carriers like AT&T have become ESPs and take advantage of the exemption for traffic they declare to be "enhanced." Using the ESP exemption, these service providers are establishing service nodes in large multi-line hunt groups (anywhere from 10 to 500 lines per node) in locations where they will be within the local call radius of their target market. For example, in one residential neighborhood near San Francisco which has historically seen very low growth in access lines we recently experienced high blockage of interoffice calls in the late afternoon and throughout the evening. A service provider had established a 200 line hunt group in

[151] CTIA, p. 39.
[152] Id.

that office, and all its customers within a 12 mile radius (the local calling area) were calling in for service access. To alleviate the blockage, we added interoffice trunking well beyond that which was needed for the normal growth in voice traffic. Yet, no additional usage revenue resulted from providing these additional facilities.

So, unfortunately, we <u>have</u> been experiencing blockage, and CTIA is absolutely wrong when it states:

> Largely as a function of this excess capacity purposely engineered into the system, the telephone network is capable of rapidly providing and accommodating new services and technologies such as facsimile machines and Internet services and without any accompanying network stress or overload.

CTIA's faulty argument is similar to TCG's. TCG asserts that there are no additional LEC costs unless the total volume of traffic rises. According to TCG, it does not matter if more of that traffic now originates on a CMRS network and less on the LEC's.[153] This argument is similar to Comcast's claim that Bill and Keep "benefits incumbent LECs."[154] These arguments not only ignore our actual traffic growth but also our fixed costs. If we lose customers, it is true that we do not need to expand capacity as a result of that, but we do not lose enough costs to come out even, or ahead. It would be a strange business that did.

CTIA has one more argument. It points out that in the VDT and Price Cap proceedings, the LECs said that they would continue to upgrade their networks. CTIA

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[153] TCG, pp. 15-17.
[154] Comcast, p. 9.

reasons that if the LECs were going to expand anyway why should CMRS providers pay any of the costs.[155] But, of course, the reason that the LECs planned to upgrade and expand their networks was so that they could continue to handle all the traffic that would be coming their way, both wireless and wireline traffic, where it is economically feasible. Moreover, this argument pretends that CMRS providers are all new to the market. Cellular providers and others have been interconnecting with LECs for years. If suddenly these CMRS providers stop paying because of Bill and Keep, we will have a large shortfall in our recovery of costs. One way or another, the arguments by CTIA and other CMRS providers are designed to urge the Commission to exclude the LECs' costs of adding capacity from the Commission's analysis of LEC costs. That is, these CMRS providers want the Commission to ignore LRIC and instead concentrate on short run incremental cost ("SRIC"), in order to try to support a finding that a price of zero is not outrageous. Basing the cost analysis on SRIC would be contrary to any sound economic theory.[156] In fact, in addition to LRIC, it is essential to consider the shared and common costs that LECs must recover in order to invest in their networks and stay in business.[157]

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[155] CTIA, p. 41.

[156] See Comments By Pacific Bell, Pacific Bell Mobile Services, and Nevada Bell, pp. 37-40, 44-48.

[157] See id.

Dedicated Access Facilities - - We Must Have The Opportunity To Recover All Our Costs

CMRS providers also go to great lengths to attempt to rationalize not fully compensating LECs for the use of dedicated access facilities. Several CMRS providers assert that they and the LECs should share equally the costs of entrance facilities that the CMRS providers order from the LECs to interconnect the CMRS providers' offices (i.e., MTSOs) to the LECs' offices (i.e., tandem or end offices).[158]

The CMRS providers' rationale for this sharing proposal is that end users of both CMRS providers and LECs benefit. This argument has a number of flaws that require its rejection.

First, CMRS providers have requested that the LECs not charge their end users for toll calls in order to make the CMRS providers' services more attractive. CMRS providers now say that because the LECs' end users benefit from calling CMRS providers' end users, CMRS providers should be relieved of paying half the dedicated access prices. Given the difficulty and time needed to revise end user charges, this means that for at least a year the LECs would not be compensated for half of the entrance facilities.

Second, both the payment arrangement and the facilities are the same as for IXCs, and IXCs are paying for the full facility at cost-based rates. The CMRS providers are seeking special treatment. Any consideration of the type of change they advocate,

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[158] See, e.g., AirTouch, p. 23; APC, p. 13; AT&T, pp. 12-15; Sprint, p. 13; Sprint/APC, p. 30.

including how to avoid unreasonable discrimination, would have to take place in a proceeding to reform the access structure.

Third, based even on the CMRS providers' flawed logic, they would have to pay enough to cover approximately 80% of the costs of the facility, not 50%, because over 80% of the calls between CMRS providers and LECs are originated by CMRS providers.

The CMRS providers' attempt to avoid paying half of the charges for dedicated transport is related to their flawed arguments about how they use this transport for cellular service. AirTouch states that "cellular carriers have no say about where they want to interconnect with a LEC [and] are forced to locate cell sites near an End Office to avoid the high monthly charges."[159] AirTouch mentions Pacific Bell's rate for High Capacity, DS1 Dedicated Access Service.[160]

AirTouch's statement has a number of flaws. First, CMRS providers place cell sites based on the locations of their mobile customers or wherever coverage is needed, not based on the locations of LEC end offices. Second, they may interconnect at any of our tandem offices or end offices. Third, they do not need to use our DS1 access service. For instance, they may use our DS3 or our wireless interconnection alternatives. Fourth, they may use a CAP's facilities or build their own and collocate in our central offices.

The Commission pointed out:

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[159] AirTouch, p. 27.
[160] Id. at 28.

> LECs' existing interstate access tariffs include flat rates for dedicated transport (entrance facilities and direct-trunked transport) that we have concluded, in general, are reasonably cost-based. Similar charges are included in many LEC intrastate access tariffs. These tariffed charges could be applied to CMRS providers relatively rapidly, with virtually no additional administrative proceedings. Moreover, we believe that the dedicated transport facilities used to connect LEC and IXC networks are similar or identical to the facilities connecting LEC and CMRS networks.[161]

CMRS providers have the option today of purchasing our dedicated transport out of our access tariffs, and some do. Others purchase the facilities as bundled parts of wireless interconnection alternatives. Either way the CMRS providers have asked us to build and maintain facilities, just like IXCs do, and the CMRS providers should pay for them. If they do not want to use our facilities they can build their own or use a CAP's facilities. If they use their own or a CAP's facilities, the LEC should certainly not pay half the costs of those facilities, as proposed by Sprint.[162]

<u>Bill And Keep Would Not Bring "Administrative Simplicity" -- Billing And Other Changes Would Be Needed</u>

AirTouch speculates that the "costs of rate design, billing, collection, and audit <u>may be</u> large relative to the costs of the underlying transmission service, so that it may be most efficient to eliminate interconnection charges."[163] Similarly, concerning Bill and Keep, PCIA states, "Because carriers bill only their own customers, they do not need to

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161 <u>NPRM</u>, para. 64.
162 Sprint, p. 13.
163 AirTouch, p. 11.

modify their current billing systems."[164] TCG states that Bill and Keep "avoids the need for the construction of complicated usage measurement and billing systems which are required where per-minute charges are involved."[165]

These statements are wrong. If the Commission adopts Bill and Keep, the LECs will have to make major changes in their billing systems, as well as other changes, and then make changes again when the Commission adopts a long term policy. For instance, with our most popular wireless interconnection service, Type 2A, per CMRS providers' requests, our billing system currently is set up to bill our end users for a local call for calls anywhere within the LATA. For calls over 12 miles from the originating caller's central office (toll calls) we reverse bill to the CMRS providers. If the Commission ordered Bill and Keep, we would need to change our CABS and CRIS billing systems to stop billing the CMRS providers and to start billing our end users the normal tariff rates for toll calls. This would be a big task because the changes would affect 542 NXX codes. In addition to the toll call changes, we would have to make physical and administrative changes to our service order and billing process for dedicated facilities. These changes would be needed because currently most CMRS providers choose to purchase the dedicated facility together with the rest of the service and be charged on a usage basis. We also would need to continue billing to recover the costs of mobile-to-land calls that involve Operators, Directory Assistance, and other special features that CMRS providers do not provide for us.

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[164] PCIA, p. 10.
[165] TCG, p. 9.

The California PUC probably would require us to send notices to our end user customers informing them of the change in end user charges. We estimate that sending the notice alone would cost over $1 million, and that the billing and ordering changes would result in expenses of several millions of dollars.

Thus, changing to Bill and Keep would not be simple or inexpensive. In addition, once the Commission moved away from interim Bill and Keep, the LECs again would need to make complex and expensive changes.

<u>AirTouch's Comments Are Misleading Concerning Off-Peak Bill And Keep</u>

In our Comments, we pointed out that since Bill and Keep would be a disastrous policy any limitation on it would be better than nothing. Limiting Bill and Keep to off-peak periods would be better than pure Bill and Keep. We also pointed out, however, that off-peak Bill and Keep still would frustrate our opportunity to recover costs and would require billing and other changes that would take considerable time and expense to implement.[166]

AirTouch's comments opposing off-peak Bill and Keep, however, are misleading and warrant a brief reply. For instance, AirTouch states that "a full peak-load pricing system would have to be implemented at the switch level."[167] Actually, this system would not make sense. No telecommunications carriers price by individual switch.

[166] Comments By Pacific Bell, Pacific Bell Mobile Services, and Nevada Bell, p. 66.

[167] AirTouch, p. 25.

Price variances are based on such factors as time of day, zone averaging, or volume discounts, but not by switch.

AirTouch also states: "LEC's generally refuse to provide detailed billing system information for CMRS providers. It does not provide breakdowns by time of day or switch."[168] Although our billing system does not automatically provide these data, Pacific Bell has provided CMRS providers, including AirTouch, traffic breakdowns by time of day (peak and off-peak), by switch location (tandem and end office), and by call duration that would allow CMRS carriers to check the accuracy of billing. We provided these data in bill-impact comparisons for interconnection alternatives and to determine likely end offices for use with Type 2B interconnection. AirTouch provided to us data from its records that supported our data.

In its discussion of off-peak bill and keep, AirTouch states that "...it would be unwise to experiment with LEC-CMRS interconnection at this critical point in the industry's development."[169] Current arrangements will continue to work well pending negotiations of new ones based on mutual compensation. The Commission should not experiment with "interim" changes.

<u>The California PUC's Interconnection Policies Do Not Support Bill And Keep For LEC-To-CMRS Provider Interconnection</u>

Comcast states: "There is evidence that ILECs also have engaged in anticompetitive discrimination in interconnection tariffs at the state level. The California

[168] <u>Id.</u>
[169] <u>Id.</u> at 26.

Public Utility Commission's ("California PUC") Local Competition Order requires that ILECs make just, reasonable and nondiscriminatory rates, terms and conditions available in their interconnection tariffs to competitive local exchange carriers ("CLCs"). Pacific Bell has introduced terms into its CLC interconnection tariff, however, that would exclude all wireless carriers."[170]

Comcast's argument that Pacific Bell is engaging in anticompetitive discrimination based on the California PUC's Local Competition Order is absurd. As the California PUC states in its comments in this proceeding, the CPUC's adoption of interconnection arrangements in its Local Competition proceeding have been limited to "facilities based CLCs," and "no applications for CMRS are pending."[171] In its comments, the California PUC explains that it is "currently reviewing its policy toward LEC-CMRS interconnection in the context of its ongoing local exchange competition proceeding."[172] The California PUC describes its current policy on the pricing of LEC-to-CMRS provider interconnection as follows:

> In California, LEC-CMRS interconnection arrangements are negotiated, not tariffed. The CPUC has directed that these contracts should contain standard terms and conditions, options for various serving arrangements and pricing structures, and be offered on a non-discriminatory basis. A standard contract has developed. These contracts are submitted to the CPUC, and are available for review. The contracts allow a variety of specific interconnection arrangements.
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[170] Comcast, p. 7.
[171] See California PUC, p. 8.
[172] See Id. at 3.

> The CPUC has never established cellular interconnection rates. The CPUC has directed that these rates should be cost-based. In practice, these negotiated, cost-based rates have been based on the LEC's cost of providing interconnection to Interexchange Carriers (IECs). For example, the call termination rate that is common to all Pacific Bell-cellular interconnection contracts was based on Pacific Bell's switched access charges, excluding inappropriate non-traffic sensitive elements.[173]

Thus, we are complying with the policies of the California PUC. Contrary to Comcast's assertions, wireless interconnection is provided by contract in California, and we are not unreasonably discriminating in the provision of interconnection.

TCG cites California's one-year interim Bill and Keep provision for local service interconnection between LECs and CLCs as a reason that the Commission should adopt Bill and Keep for wireless interconnection.[174] TCG is wrong.

The California PUC has serious concerns regarding the idea of applying Bill and Keep to CMRS, in particular "the demonstrable lack of traffic balance between LECs and cellular carriers."[175] The California PUC points out that if traffic is not balanced, "then the Commission must rely on the notion that call termination costs are negligible."[176] In its local competition proceeding, "California has not yet solicited evidence to indicate that call termination costs are negligible."[177]

Comcast names California as an example of "states that have acknowledged that a zero-based charge for termination of traffic between the incumbent LEC and

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[173] Id. at 4-5.
[174] TCG, p. 5.
[175] California PUC, pp. 11-12.
[176] Id. at 12.
[177] Id.

competitive networks will promote local exchange competition and reflects the value of a mutual exchange of traffic between competitors, rather than an ordinary service provided by a carrier to customers."[178] Comcast misstates the California PUC's reasons for adopting its limited one-year interim Bill and Keep for LEC-to CLC interconnection. In its comments, the California PUC sets forth the reasons:

> There are two reasons for this interim decision: (1) insufficient data on the cost of terminating local traffic, and (2) uncertainty that traffic flows would be sufficiently unbalanced to warrant costly billing procedures.[179]

Thus, the California PUC adopted interim Bill and Keep because of uncertainty, not because it acknowledged that it promotes competition or reflects the mutual exchange of traffic. Unlike the LEC-to-CLC situation, with LEC-to-CMRS provider interconnection there is a history of traffic imbalance. Moreover, the LECs' billing procedures are already in place for CMRS interconnection, and it would be costly to change them to reflect Bill and Keep. Another difference is that the California PUC applies to CLCs "certain consumer protection, service quality and universal service obligations."[180] As Time Warner points out, the CMRS providers do not face all the same obligations as LECs under some parts of the new Act, and differences "must be accounted for in the development of realistic regulatory policies...."[181]

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[178] Comcast, p. 12.
[179] See California PUC, p. 8.
[180] See California PUC, p. 8.
[181] Time Warner, p. 8.

Comcast is mistaken when it attempts to use the California PUC's requirement as a precedent for Bill and Keep, including full use of the LECs' access tandem networks.[182] As Comcast acknowledges, the California PUC leaves points of interconnection up to mutual agreement via negotiation.[183] The California PUC's one-year interim Bill and Keep requirement is for only local traffic. There are substantial costs associated with calls entering our network at the tandem level that have nothing to do with the costs of a local call. Most local calls that are internal to our network do not use the access tandem network at all. As we discuss above, we must be allowed the opportunity to recover our tandem switching and common transport costs as well as the costs of any of our dedicated facilities that the CMRS provider uses. Accordingly, under the California PUC's preferred outcomes for LEC-to-CLC interconnection, rather than Bill and Keep, intrastate switched access charges apply to toll calls.

Moreover, even for local calls "interconnection agreements can take place outside this [interim Bill and Keep] framework."[184] Our agreement with MFS for Mutual Compensation, which the California PUC approved with modifications, is an example of this type of agreement. See Part II - A-1 above concerning our agreement with MFS.

In summary, the California PUC will review its policies concerning LEC-to-CMRS provider interconnection. It's current interconnection policies do not support Bill and Keep for that interconnection.

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[182] Comcast, pp. 23-24.
[183] Id.
[184] See California PUC, p. 7.

3(B). MANDATORY BILL AND KEEP WOULD TAKE LEC PROPERTY WITHOUT COMPENSATION

Mandatory, free CMRS-to-LEC interconnection via Bill and Keep would violate the Fifth Amendment's takings clause. Such mandatory interconnection would be unconstitutional because it would constitute 1) an impermissible physical intrusion into a LEC's property[185] without just compensation, and 2) an unlawful regulatory taking.

The Commission cannot reject our takings arguments based on bald assertions by Sprint Spectrum and APC that "the Commission is not proposing to authorize a permanent physical invasion of anyone's property (citing Loretto)" and that Bill and Keep will not "deprive anyone of 'all economically beneficial or productive use' of property (citing Lucas v. South Carolina Coastal Comm'n, 112 S.Ct 2886, 2893 (1992))."[186]

Mandatory Bill And Keep Is A Physical Intrusion Into A LEC's Property That Requires Just Compensation

As Bell South points out, "the requirement that a LEC transport and terminate CMRS traffic constitutes a physical intrusion into the LEC's property." We agree. Moreover, Bill and Keep does not provide just compensation. Physical invasions are

[185] See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 434-35 (1982) (any "permanent physical occupation" of property is an intrusion of such an "unusually serious character" that it constitutes a taking without regard to the public benefit the rule services or the insignificance of the property owner's economic loss).

[186] Sprint and APC, pp. 26-27.

deemed to be takings without a need for further analysis.[187] The physical invasion here is substantial. As Bell South explains:

> A LEC must engineer its telephone exchange plant to accommodate the busy-hour traffic originated by CMRS providers. Because many of the facilities involved are traffic-sensitive, the traffic originated by a CMRS provider requires the LEC to make investments in physical property to accommodate such traffic in order to avoid degrading the service provided to others. When traffic is offered by the CMRS provider for termination on the LEC's network, the LEC is obligated to devote its wires and switching facilities to the carriage of this traffic. As a result, property in the LEC's switching offices and distribution network is physically occupied by the CMRS-originated traffic when in use to carry this traffic, and the LEC is denied the use of this property to serve others for the duration of the CMRS-originated calls. Because the LEC is obligated by the FCC's policy to invest in physical plant in order to terminate CMRS-originated traffic, this plant is physically occupied when traffic is offered, and the LEC is denied the ability to use this physical plant for any other purpose, a taking clearly occurs.[188]

Mandatory Bill And Keep Is An Impermissible Regulatory Taking

In addition, the required free interconnection regulates LECs to such an extent that it runs afoul of the takings clause. "[I]f regulation goes too far it will be recognized as a taking."[189] If, in connection with the Commission's proposed Bill and Keep

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[187] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.").

[188] Bell South, pp. 19-20 (emphasis added).

[189] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

mechanism, one examines 1) the character of the governmental action, 2) the extent of the interference with reasonable, investment-backed expectations, and 3) the economic impact of the governmental action,[190] one must conclude the test for impermissible regulatory takings is met.

The governmental action physically intrudes on LECs' property and breaks a promise to LECs of just and reasonable compensation.[191] Thus, the "character of the government action" meets the test for a taking.

The action also deprives LECs of any compensation from CMRS providers -- the cost causers -- for CMRS-LEC interconnection, thus interfering with the reasonable investment-backed expectations LECs have of payment by the cost causer for use of their networks. A court reviewing a rate order must assure itself that "the order may reasonably be expected to . . . fairly compensate investors for the risks they have assumed."[192] "Constitutional principles are applied to prevent confiscatory regulation. Utilities are so vulnerable to arbitrary action of government, and the service utilities provide is so critical to the functioning of society as a whole, [that] the courts have enforced a constitutional requirement designed to prevent confiscation of utility investment."[193] Mandatory Bill and Keep fails to meet this test.[194]

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[190] Penn Central Transportation Co. v. New York City, 438 U.S. at 124.

[191] 47 U.S.C. § 201. Where utility rates violate "investor interest against confiscation," they are not just and reasonable. See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987).

[192] Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968) (emphasis added).

[193] Richard McKenna, The Special Constitutional Status of Public Utility Regulation: From Munn to Duquesne Light, 21 U. West. L.A. L. Rev. 31, 32 (1990). See also Comments of U.S. West at 49-53 for a detailed discussion of why the Commission's proposal constitutes an impermissible taking.

The reliance by Sprint and APC on Hope (320 U.S. 591) is unavailing. Under Hope, whether or not there is confiscation depends on "whether the end result of the entire process results in sufficient rates over all." With rate of return regulation, LECs were allowed the opportunity to earn a set rate of return and, thus, lowering the rate for one service did not necessarily make the overall compensation insufficient so long as other rates were increased. Now we are under price cap regulation. If the Commission orders Bill and Keep without taking other compensating action (e.g., increasing the SLCs) rates overall will be insufficient to avoid confiscation.[195] Thus, mandatory Bill and Keep, as proposed by the Commission, would be an unconstitutional regulatory taking.

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[194] Moreover, the Commission has held that a LEC is not required to provide non-compensatory interconnection to a wireless carrier. See Rogers Radio Communications Service v. FCC, 751 F.2d 408, 414-5 (D.C. Cir. 1985).

[195] Dr. Timothy Tardiff has explained concerning rate of return regulation and price cap regulation: "Both forms of regulation allow the LECs the opportunity to recover prudently incurred costs. Therefore, when regulatory action reduces the amount of cost recovery for certain services by lowering rates, offsetting rate increases for other services are implemented. In the case of interstate access services, the reductions in switched carrier access charges were accompanied by increases in subscriber line charges as well as cost shifts to the intrastate jurisdiction. In all cases, the LECs were permitted full cost recovery (or a reasonable opportunity to fully recover costs under incentive regulation)." "Pricing Interconnection And The Local Exchange Carriers' Competitive Interstate Services," NERA, Timothy J. Tardiff, February 11, 1993, p. 7.

B. IMPLEMENTATION OF COMPENSATION ARRANGEMENTS

1. NEGOTIATIONS AND TARIFFING SHOULD BE USED TOGETHER

Various CMRS providers, IXCs, and LECs express support for a process of privately negotiated interconnection agreements. Some of these parties also describe the benefits of tariffing for terms of common application or to resolve disputes. The flexible approach of combining negotiated contracts and tariffing is administratively efficient, allows tailoring to meet competitive needs, and is consistent with the new Act's preference for negotiated agreements in the first instance.[196]

Several CMRS providers cite the need for and benefits to be gained from individualized negotiations. Allied states: "One solution would require tariffs as a 'common denominator,' available to all comers, but would also take to heart the Act of 1996, which encourages negotiated interconnection contracts. Act of 1996, Section 251c(1) and 251c(2)(C)."[197] APC appears to favor negotiations where it believes that it will benefit from them. APC states that CMRS providers should be permitted to negotiate with IXCs mutually acceptable access compensation for direct connections.[198] If negotiation works in one context, there is no reason that it should not work in another, as long as there is some regulatory oversight, as the new Act contemplates.

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[196] See, e.g., Ameritech, pp. 11-12; GTE, pp. 6-10: AT&T, p. 17.
[197] Allied, p. 11.
[198] APC, pp. iii, 15.

Several IXCs also support individualized contract negotiations, at least in certain contexts. AT&T states that "LEC-to-CMRS interconnection arrangements should continue to be established through contractual negotiation."[199] Sprint appears in principle to support the flexibility afforded by contracting. In commenting upon arrangements between IXCs and CMRS providers, Sprint states that "[t]o date, compensation arrangements between IXCs and cellular carriers have been left to agreement between the parties without, to Sprint's knowledge, any belief that either side has been seriously prejudiced by the existing arrangements."[200] MCI supports "contract tariffs," noting that they "can be designed to the specifications of a given customer's needs, subject to the obligation to being made generally available."[201]

The LECs also support contracting. We explained our contracting process in our Comments, and demonstrated that the process has resulted in fair agreements.[202] We also explained the beneficial role of tariffs for terms of common application and to resolve disputes. USTA,[203] Bell South,[204] US West,[205] GTE,[206] SBC Communications,[207] Ameritech[208] and Cincinnati Bell Telephone[209] all agree that contracting produces beneficial results.

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[199] AT&T, p. 17.

[200] Sprint, p. 16.

[201] MCI, p. 12.

[202] Comments By Pacific Bell, Pacific Bell Mobile Services, and Nevada Bell, pp. 26-28, 90-91, and Exhibit C.

[203] USTA, p. 7.

[204] Bell South, p. 30.

[205] US West, p. 6.

[206] GTE, p. 40.

[207] SBC Communications, p. 13.

[208] Ameritech, p. 4.

[209] Cincinnati Bell Telephone, p. 2.

The Commission should be guided by the new Act and the foregoing comments and allow parties to negotiate contracts in the first instance, while leaving room for tariffing for terms of common application, and state commission involvement to resolve disputes and approve final agreements.[210] This hybrid approach will produce flexibility and enhance competition, and thus is far preferable to the Commission's current plan to mandate bill and keep interconnection arrangements that are neither fair nor efficient.

The Commission May Not Require Abrogation of Our Existing Interconnection Contracts

The Commission should not attempt to require us to abrogate our existing CMRS interconnection contracts by mandating a Bill and Keep regime, especially in light of the new Act's emphasis on private negotiations rather than regulatory intervention in setting interconnection rates. Moreover, even before enactment of the new Act, the District of Columbia Circuit stated: "The Communications Act contains no express statement of an intention to authorize unilateral modification or abrogation of privately negotiated contracts. Nor do the various provisions of the Act 'imperatively require' that we imply such authorization."[211] In addition, CMRS providers have long supported negotiated

[210] The Commission should reject AirTouch's recommendation that contracts filed with the Commission should include proprietary LEC information, but not proprietary CMRS provider information. AirTouch, p. 42. The concerns AirTouch mentions regarding its information are true for ours as well. Again, AirTouch is seeking special treatment that is inconsistent with the need for a level playing field for all providers.

[211] Bell Telephone Co. of Penn. v. FCC, 503 F.2d 1250, 1280 (D.C. Cir. 1974), cert. denied, 422 U.S. 1026 (1975). See also In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution